Editor's note: Appealed –reversed, Civ.No. 78-161K (D.Wyo. Sept. 19, 1979), 477 F.Supp. 120

PEABODY COAL CO.

IBLA 77-59 Decided March 10, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, denying appellant's request for an extension of time under 43 CFR 3521.1-1(a) to make a showing of the quantity and quality of minerals discovered within the area included within its coal prospecting permits. W-13800, etc.

Affirmed.

1. Coal Leases and Permits: Applications

An application for an extension of a prospecting permit under the Mineral Leasing Act is not a "valid existing right" within the meaning of the savings clause of sec. 4 of the Federal Coal Leasing Amendments Act of 1975, and is not, therefore, an interest which survives the amendment of the Mineral Leasing Act.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., for Appellant; Lawrence G. McBride, Esq., Office of the Solicitor, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Peabody Coal Company appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 21, 1976, refusing to grant extensions of time under 43 CFR 3521.1-1(a) to make a showing as to the quantity and quality of the coal discovered within the area included within prospecting permits W-13800, W-13801, W-14277, W-20057, W-21119, W-24984, and W-24985. 1/

The facts in this case are not in dispute. Essentially they are as follows:

1/ Permit W-32066 was originally included in this appeal, but, at the request of appellant, that appeal has been dismissed.

The seven cases in this appeal involve coal prospecting permits, above-identified, which were issued between June 1, 1970, and December 1, 1970, under the terms of section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201(b) (1970). (Amended by section 4 of the Federal Coal Leasing Amendments Act of 1975, infra.) In each case, an application for a 2-year extension of the permit was filed under 43 CFR 3511.3-1 (1972) within the term of the original permit. No action was taken by BLM on these applications for extension.

In February 1973, assignments of the permits to Peabody, appellant herein, were filed for approval by BLM. No action was taken by BLM on these requests while the applications for extension of the permits were outstanding.

On February 13, 1973, Secretarial Order No. 2952 was issued. This Order barred the issuance of coal prospecting permits on pending applications before BLM, and barred the acceptance of any further applications for coal prospecting permits, but did not, by its terms, prohibit the granting of extensions to coal prospecting permits then in existence.

By letter dated January 18, 1974, BLM informed appellant that action on each application for extension was being suspended pending implementation of a complete coal leasing program. This letter was based upon an instruction from an Assistant Director, BLM, to the Wyoming State Director, and specifically named six of the seven applications now at issue. The memorandum instructed: (a) that coal prospecting permit extension applications would be suspended until full implementation of the coal program under study, except for those applications which met the short-term lease criteria established by the Secretary's memorandum approved February 13, 1973, and BLM Instruction Memorandum No. 73-231, and (b) that any extension application in the Northern Great Plains Coal Resource Study Area would require Secretarial action pursuant to the Secretary's memorandum of June 30, 1972, and I.M. No. 73-138.

In these seven cases on appeal, between May 22, 1974, and October 30, 1974, and within 4 years of issuance of the original permit in each case, appellant filed applications for preference-right leases describing the permitted lands, under the now-amended provisions of 30 U.S.C. § 201(b). These applications were rejected severally by BLM decisions dated between July 3, 1974, and February 6, 1975. Each decision stated:

> Because the preference right lease applications were not filed prior to the expiration of the initial two-year permit, applications for preference right lease [serial

> numbers] are hereby rejected. When this decision becomes final, the advance rentals submitted with the preference right lease applications will be refunded. This decision is without prejudice of your right to file new applications for preference right leases after extension of the prospecting permits, if such extensions are granted pursuant to the pending applications for extension * * *.

In addition, the decision relating to applications W-24984 and W-24985, stated:

> In connection with the extension of the coal prospecting permits, it is the Department's policy that an extension commences on the first day of the month after its approval * * *. If an extension is granted, the permittee would have an additional full two-year period in which to exercise its rights under the prospecting permit.

These decisions were not appealed.

By regulations promulgated May 7, 1976, 41 FR 18845, the Department defined "commercial quantities" of coal, the statutory standard applicable to preference-right lease applications. The regulations include a provision authorizing the grant of extensions of time in which a permittee could submit data required to demonstrate the discovery of commercial quantities of coal on the permit lands. 43 CFR 3521.1-1(a)(2).

On June 29, 1976, appellant filed such applications. By a letter dated October 21, 1976, BLM rejected the applications, stating:

> On July 1, 1976, we received letters from you requesting an extension of one year to supply additional information as requested in 43 CFR 3521.1-1(a)(2) as published in the Federal Register of May 7, 1976, for the above-referenced prospecting permit applications.
>
> On July 3, 1974, we issued a decision rejecting preference right lease applications W-13800, W-13801, W-14277 and W-20057 due to the reasons that the preference right lease applications were not filed prior to the expiration of the initial two-year period. On August 19, 1974, we rejected preference right lease application W-21119 and on February 6, 1975, we rejected preference right lease applications W-24984 and W-24985 for the same reason as stated above. Prospecting permit W-32066 was rejected and closed in April of 1973. Consequently, we are not in a position to issue you extensions of time for these

prospecting permits since preference right lease applications were never accepted.

On November 17, 1976, this appeal was filed.

In the meantime, on August 4, 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1085.

Appellant's argument is three-fold:

> I. But for the imposition of any moratorium, the approval by the Wyoming State Office of appellant's applications for prospecting permit extensions (A) was not necessary in order for the extensions to take effect, and (B) was a matter of right because of Departmental policy.
>
> II. There was in fact no moratorium imposed which legally authorized the continued failure of the Wyoming State Office to act on appellant's applications for prospecting permit extensions.
>
> III. Appellant acquired valid, enforceable rights to have favorable action taken on its applications for prospecting permit extensions, and to be issued preference-right leases for any discoveries made through its prospecting work of coal in commercial quantities.
>
> A. Appellant, at a number of points, acquired rights to have its applications for prospecting permit extensions acted upon.
>
> B. Appellant, in the absence of notice from the Wyoming State Office of a policy of refusal to act on its applications for prospecting permit extensions, was entitled to continue its prospecting work as it did; and if, through such prospecting work, it made a discovery of coal in commercial quantities, it became entitled to issuance of a preference-right lease. Alternatively, appellant is entitled to further time, commencing now, to conduct prospecting work. To whatever extent the 1976 amendments to the regulations on commercial quantities are applicable, appellant must be allowed an additional period, at the appropriate time, to submit the information required by those amendments.

The Office of the Solicitor, answering on behalf of BLM, contends essentially that the BLM decisions of July and August 1974, and

February 1975, rejecting appellant's preference-right lease applications were not appealed and so finally disposed of the issues there decided; that the BLM letter of October 21, 1976, from which appellant takes this appeal is (a) not an appealable decision, or (b) if deemed appealable by the Board, does not give rise to any issues pressed by appellant pertaining to extension of coal prospecting permits; and that if the issues pressed are within the jurisdiction of this Board, appellant is not entitled to any of the relief requested because (a) extension of coal prospecting permits is only in the discretion of the Secretary, so extension of the permits in question did not occur in the absence of positive Secretarial action on the extension applications, (b) the failure of BLM to act on the applications for extension violated no rights of Appellant, and (c) the Secretary now has no authority to extend the prospecting permits as Congress repealed this authority by enactment of section 4 of the Federal Coal Leasing Amendments Act of 1975.

Peabody responded to the Solicitor's answer, contending that the State Office decisions do not necessarily imply that a permit extension cannot occur without departmental action and the decisions should be read as saying only that action on the preference-right lease applications can only be taken once the fact of prospecting permit extensions is given official recognition, and that the Department had always welcomed continued prospecting work by applicants for permit extension, pending action on the extension application, and that discovery of coal during such period always resulted in the issuance of a preference-right lease. Peabody concedes the Secretary has always had discretion concerning the extension of coal prospecting permits, but is was arbitrary and capricious to exercise that discretion in these cases to deny granting the requested extensions contrary to the long-standing departmental policy of recognizing diligence in the permittee. Peabody did continue its prospecting activities after termination of the 2-year period in the prospecting permits and did effect discovery of valuable coal deposits on each area under permit, within the period for which the extended permit should have been granted. Therefore, Peabody reasons, it should be considered to have a "valid existing right" under the Federal Coal Leasing Amendments Act of 1975.

It is axiomatic that one who fails timely to appeal an adverse decision loses whatever rights he had in the application. The importance of administrative finality cannot be disregarded. Eugene J. Bernardini, Albert Chester Travis, 62 I.D. 231 (1955). The decisions by BLM rejecting the several applications for preference-right leases having become final for want of any timely appeal, and no new applications for preference-right being before BLM, it

thus follows that there are no pending preference-right lease applications subject to the extension of time affordable under 43 CFR 3521.1-1(a)(2). BLM was correct in denying the request for such extension. The appeal therefrom is not a justiciable issue before this Board.

[1] Appellant argues that the renewal of the prospecting permits mentioned in the above-excerpted decision was not a matter in which the Bureau had any discretion and contends that the Wyoming State Office was legally bound to act favorably on the extension applications. We find, however, that the discretion to grant extensions embodied in section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 also authorized the withholding of action on such applications. To the same effect is Solicitor's Opinion, M-36894 (July 21, 1977). appellant's complaint that the Department withheld action on its lease applications without withdrawing subject lands from mineral entry is also of no moment. See Duesing v. Udall, 350 F.2d 748, 751 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966), approving Richard K. Todd, 68 I.D. 291, 296 (1961). In any event, the passage, on August 4, 1976, of the Federal Coal Leasing Amendments Act of 1975 (FCLAA), 90 Stat. 1083, repealed the Department's authority to issue prospecting permits, to extend prospecting permits, and to issue leases to permittees "subject to valid existing rights." We agree with Solicitor's Opinion, M-36894 (July 21, 1977), which holds that applications for extensions of coal prospecting permits were not valid existing rights within the savings clause of FCLAA, supra, since an application dependent upon an exercise of administrative discretion could not be considered as a vested or "valid existing" right. Thus, at the time that BLM took the action here complained of, appellant had no valid rights whatever to the lands at issue and, even if BLM had granted appellant's request for an extension of time under 43 CFR 3521.1-1(a), it was without statutory power to issue appellant either a preference lease or a permit extension. To grant the request for an extension of time would have been a mere futile gesture.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Newton Frishberg
Chief Administrative Judge